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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1981

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES JOINT APPRENTICESHIP AND TRAINING COMMITTEE AND TRAINING BOARD,
Petitioner,

VS.

LINDA ELDREDGE and CHRISTINE A. MAZUR, individually and on behalf of all others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether construction industry employers who provide on-the-job training for carpenter apprentices, and who are alleged to discriminate against women applicants, are necessary parties in an action against an apprentice training committee charged with sex discrimination because it allows applicants to solicit jobs directly with employers, where the employers can, as a practical matter, prevent realization of any relief designed to assure women the same access to apprentice training as men.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee and Training Board respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 4, 1981.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinions of the District Court for the Northern District of California are reported at 83 F.R.D. 136 (N.D.Cal. 1979) and 440 F.Supp. 506 (N.D.Cal. 1977) and also appear in the Appendix.

JURISDICTION

Judgment of the Court of Appeals for the Ninth Circuit was entered on November 4, 1981. A timely petition for rehearing and suggestion of rehearing en banc was denied on February 8, 1982, and this petition for certiorari was filed within ninety days of that date. The court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

PROVISIONS OF LAW INVOLVED

Rule 19, Federal Rules of Civil Procedure. Joinder of Persons Needed for Just Adjudication

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a

plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) . . .

(d) . . .

STATEMENT OF THE CASE

Two women applicants for apprenticeship in the carpenters trade, Linda Eldredge and Christine Mazur, complained that the Carpenters 46 Northern California Counties Joint Apprenticeship Training Committee and Training Board, or JATC, encouraged sex discrimination by allowing applicants for apprenticeship to solicit employment through direct contact with building contractors.

The JATC, defendant in this proceeding and petitioner here, had established a program accepting for classroom instruction any person who met minimal criteria and who could find a participating contractor to provide employment and the corresponding on-the-job training. Eldredge and Mazur complained that this program had a disparate impact because women had greater difficulty than men in obtaining employment in this fashion, and they invoked Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5 *et seq.*, to secure a system of referral which minimized employer selectivity in hiring. In May 1976, 13 of 3,200 carpenter apprentices in Northern California were women.

There was no issue of systemic discrimination in the process by which applicants were indentured by the JATC or claim that the JATC applied neutral criteria in a discriminatory fashion. Instead, Eldredge and Mazur claimed that the JATC had a duty under Title VII to prevent or at least minimize the opportunity for discrimination by employers who hired apprentices.

The JATC contended it had no role in hiring or dispatch of apprentices and provided training to any person who met the minimal qualifications and was employed by a contractor signed to the carpenter's agreement. The authority granted in its trust agreement was limited by and subject to collective bargaining agreements which preserved for employers the right to select their employees. The JATC asserted that it had no power to require employers to hire or keep apprentices and that any order of the court directed against the JATC alone would not improve em-

ployment opportunities for women apprentices. It claimed that the individual signatory employers, as the alleged source of discrimination, were indispensable parties under Rule 19, Federal Rules of Civil Procedure, because, as a practical matter, they could prevent realization of the intended relief.

The JATC is a joint labor-management committee established in 1963 under a trust agreement by various local unions of the United Brotherhood of Carpenters and Joiners of America and eleven contractor associations representing employers of carpenters in Northern California. The trust agreement empowered the JATC, acting as a board of trustees, to establish a program for educating and training journeymen or apprentices to supply a pool of skilled journeymen. The trust agreement provided, in Article VIII, Section 1, that in all matters pertaining to the authority of the JATC the terms of the controlling collective bargaining agreements prevailed:

> Section 1. Subject to the provisions of the Collective Bargaining Agreements, the rights and duties of all parties, including the Employers, the Signatory Associations, the Individual Employers, the Unions, the Local Unions, the District Councils, the Employees and Trustees, shall be governed by the provisions of this Trust Agreement and contracts procured or executed pursuant to this Trust Agreement. (CR 36, Exhibit 10, Apprenticeship and Training Trust Fund, page 18).[1]

Employment of union carpenters in Northern California was covered by two master agreements with different em-

[1] "CR" refers to the clerk's record below by docket number.

ployer associations, whose terms were identical for purposes of this action. (CR 36, Exhibits 11 and 12). Individual employers who were not builder members of one of those associations, known as "independents," signed "Memorandum Agreements" by which they promised to comply with the master agreement and to be bound by the corresponding trust agreements. Independents were responsible for approximately one-half of all hours reported for union carpenters in Northern California. Altogether, approximately 4800 employers were active under one or more of these agreements.

Under the collective bargaining agreements, an employer had complete freedom of selectivity in hiring and was permitted to reject any job applicant referred by the union for any reason, or to terminate any employee for cause which he deemed sufficient, providing that he did not unlawfully discriminate against an employee for reasons of union activity or on the grounds of age, sex, race, color or national origin. (CR 36, Exhibits 11 and 12, Section 49). Hiring hall provisions of the agreement required an employer who needed carpenters to place a request with the local union or district council which operated a hiring hall in the particular geographical area. An employer could request by name workers who had been employed by him within the jurisdiction of a local union or district council within three years previously, and those would be given preference. He was also entitled to designate up to 25 percent of his employees notwithstanding hiring hall provisions.

In August 1974, the JATC, with the approval of the Division of Apprenticeship Standards, Department of Industrial Relations for the State of California, implemented a uniform affirmative action plan, Annex C-1, to cover each of 43 local committees organized under 10 district offices. To qualify under Annex C-1, an applicant was required to meet certain minimum qualifications not challenged in this case. Additionally, he had to obtain a position on a "new applicant referral list" established by the local committee in the area in which he wished to work, and to obtain employment with a signatory contractor. (CR 36, Exhibit 6). He obtained a position on the new applicant referral list by appearing in a district office at a date and time specified in notices circulated to numerous public agencies, news media and outreach programs. If the applicant met the minimum requirements, he was placed on the new applicant referral list in the order in which his application was received, until the number of persons on the list reached 150 percent of the number of openings for new apprentices which the local committee expected in the succeeding year. When the list was filled, the district coordinator reviewed it to determine whether it complied with goals and timetables for minority hiring established under Annex C-1, then posted the list and provided copies to each union dispatcher and various outreach programs.

Once on the referral list, an applicant could obtain employment either by contacting employers directly, known as the "hunting license," or by referral off of the new applicant referral list. Under the first procedure, an applicant could ask an employer to place a request by name with the local committee. The applicant was then inden-

tured and sent to the local union for dispatch to the employer as a registered apprentice. The vast majority of all new carpenter apprentices located work in this manner.

The second method came into play in rare cases when an employer telephoned the union dispatcher and requested an apprentice but did not specify a particular individual. If there were no indentured apprentices on the union's hiring list at the time, or if the employer expressly requested a beginning apprentice, the dispatcher asked the local committee to provide him with the name of the top person on the new applicant referral list and that person, if available, was indentured and sent to the union for dispatch. The employer had the right under the collective bargaining agreement to refuse to accept the person dispatched, and his only obligation to the rejected apprentice was to pay for two hours' "show-up time." (CR 36, Exhibits 11 and 12, Section 49).

In either event, once a new apprentice was indentured, the apprenticeship committee was no longer involved in the hiring process and the apprentice reported to the union hiring hall for all future job dispatches. The JATC coordinated a program of classroom instruction to supplement on-the-job training given by the employers.

Closing the new applicant referral list at 150 percent of anticipated referrals excluded many people from availability for selection as apprentices and employers objected to limitations on the pool of applicants. Beginning in the fall of 1976, some of the local committees who had met

their goals for minority participation obtained approval of the Division of Apprenticeship Standards for an "amended Annex C-1," which was different from Annex C-1 only in that it created an open-end new applicant referral list. Under amended Annex C-1, it was not necessary to register with the local committee before looking for employment, meaning that any applicant finding employment could be indentured. Amended Annex C-1 has since been approved for a majority of local committees.

Linda Eldredge and Christine Mazur registered as applicants for apprenticeship on August 18, 1975, when the closed list procedure of Annex C-1 was still in effect. Linda Eldredge registered with the local committee in San Francisco and Christine Mazur registered in Martinez. Both obtained positions near the top of the new applicant referral list in their respective areas. After orientation meetings where applicants were told about the two alternatives for obtaining employment, both waited to be called from the top of the new applicant referral list. Neither contacted employers directly for almost one year afterward.

Within two weeks after registering with their local committees, Eldredge and Mazur filed charges of discrimination with the Equal Employment Opportunity Commission. On September 30, 1975, the day of the orientation program of the San Francisco committee, Eldredge and Mazur sued under Title VII to enjoin the use of the "hunting license" and for an order requiring referral on a first-come, first-served basis, for an affirmative action plan including goals and timetables for the advancement of women from apprentice to journey status, and for back pay.

On November 3, 1977, the District Court ordered respondents to join as additional parties within 60 days the employer contributors to the apprenticeship trust fund and local unions who dispatched registered apprentices. The District Court held that participating employers were parties in whose absence the action could not proceed under Rule 19(a), Federal Rules of Civil Procedure, because the employers, as the apparent source of discrimination, were situated as a practical matter where they could impair the effectiveness of relief; and because employers had a substantial interest in their freedom to select apprentices which could not be impaired without joining them as parties. See pp. 40-87 of Appendix E. The court also held that the local unions who dispatched apprentices registered with the apprenticeship committee had an interest in the maintenance of an effective apprenticeship training program and were in a position to impose demands upon the JATC which might conflict with any remedy awarded by the court. The court concluded therefore that the local unions were also indispensable parties.

After extensions totaling approximately one year, Eldredge and Mazur filed a motion to amend their complaint in which they named as additional defendants one of the principal contractor associations, the Northern California Home Builders Conference, and the United Brotherhood of Carpenters and Joiners of America. The District Court held that joinder of the association was not a satisfactory substitute for joinder of the individual employers, since a majority of the employers were independents or members of other associations, and because no member had con-

sented to have the association appear on its behalf in the action. See pp. 9-12 of Appendix D. The District Court dismissed the action for failure to comply with the order of November 3, 1977. Appendix C.

The District Court's judgment was reversed by the Ninth Circuit, which said that the "complete relief" with which Rule 19(a)(1) is concerned is only "relief as between persons already parties, not as between a party and the absent person whose joinder is sought." Appendix A, p. 8. The Court of Appeals stated that absent employers were not made necessary parties, and consequently could not be indispensable parties, merely because "employers could defeat any order against JATC by refusing to hire any apprentices, by hiring only unregistered, non-union apprentices, or by rejecting all female apprentices dispatched to them." Appendix A, p. 9.

REASON FOR GRANTING THE WRIT

A. The decision below conflicts with decisions of this court and several circuit courts of appeals requiring joinder, pursuant to Rule 19, of absent parties who can, as a practical matter, frustrate intended relief

Rule 19(a), Federal Rules of Civil Procedure, requires joinder of a party if "in his absence complete relief cannot be accorded among those already parties." The District Court below interpreted this to mean that joinder was necessary if, for reasons of due process, the court could not, without joining additional parties, bring about a remedy fulfilling the purpose of the statute under which plain-

tiffs invoked the court's authority. If women were denied apprentice training because employers refused to hire them, Title VII's goal of removing barriers to employment could be met only by joining those employers as defendants.

Reversing, the Ninth Circuit concluded that all Rule 19 required was that the relief requested—modification of the referral procedure for new applicants—was within the power of the existing defendant. Appendix A, pp. 9-10. Rule 19 did not, according to the Ninth Circuit, require a comprehensive remedy for sex discrimination.

The Advisory Committee notes to the 1966 amendment say with regard to Rule 19(a):

> "Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated law suits on the same essential subject matter." See 12 *Wright & Miller*, Federal Practice and Procedure, appendix C, pages 401-405 (1972).

The Supreme Court has said, "[A] court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to this suit without affecting those rights." *Shields v. Barrow* (1855) 17 How. (58 U.S.) 130.

The District Court below recognized that, regardless of any restrictions that might be placed by the Court or the apprenticeship committee on the order or means by which

applicants were referred to the union for dispatch to signatory employers, the ultimate decision to give or deny employment was one which rested exclusively with the individual employer under his collective bargaining agreement. Appendix E, pp. 47, 51-52. If the goal of Title VII was to assure that women had the same access to apprentice training as men, then the employers who provided training on the job had to be joined as defendants. The District Court said in its amended memorandum dated November 8, 1977, "The plain fact is that the opportunity to gradually integrate the trade exists now to the same extent and subject to the same obstacles as it would under any decree that could be fashioned against the JATC alone. There is no evidence that the change in referral system sought here would have any effect on the apparent source of the discrimination alleged—the absent employers." Appendix E, p. 54. The District Court had earlier said, "Although the legal position of the present defendant and its theoretical ability to comply with an order are relevant, they may be outweighed by a finding that parties may as a practical matter prevent the full realization of the intended relief. The Court must guard against the formulation of '"paper" decrees which neither adjudicate nor, in the end, protect rights.'" Appendix E, pp. 45-46, quoting in part from *Schutten v. Shell Oil Company* (5th Cir. 1970) 421 F.2d 869, 874.

The Ninth Circuit's opinion here turned upon the view that the practical ability of absent employers to undermine relief ordered against the apprenticeship committee was not relevant as long as the committee itself could be made

to comply with the court's order. By reasoning that the employers could defeat the remedial affect of any order against the apprenticeship committee by refusing to hire women apprentices dispatched to them, said the Ninth Circuit, "the District Court misapprehended the legal inquiry required by Rule 19(a)(1)." Appendix A, p. 9. Instead, the Ninth Circuit said, "JATC may not avoid its own liability for practices illegal under Title VII by relying on the employers' possible future conduct that might frustrate the remedial purposes of any court-ordered changes in the apprenticeship program." Appendix A, pp. 9-10.

This court, as well as several circuit courts of appeal, has stated that the public has an interest in allocating the finite resources of the judicial system for the "complete, consistent and effective settlement of controversies." *Provident Tradesmans Bank and Trust Company v. Patterson* (1968) 390 U.S. 102, 111. It has required that absent parties be joined or the action dismissed when the essential purpose of the relief sought could not be effectuated without the performance of some act by an absent party. See, for instance, *Kendig v. Dean* (1878) 7 Otto (97 U.S.) 423; *Warner Valley Stock Company v. Smith* (1897) 165 U.S. 28; *Gnerich v. Rutter* (1924) 265 U.S. 388. To proceed otherwise is to risk that the "court would find itself in the position of having made a decree it could not enforce, of attempting to give relief which was beyond its power, because the party whose action was necessary to that relief was not a party of the suit." *Kendig v. Dean, supra,* 7 Otto (97 U.S.) at 425.

According to the Fifth Circuit, whether a party must be joined depends upon the purpose of the litigation, not upon whether there is a prayer or request for any affirmative action on the part of the absent party. *Leber v. Canal Zone Central Labor Union and Metal Trades Council* (5th Cir. 1967) 383 F.2d 110, 115, *cert. den.* 389 U.S. 1036. A party cannot avoid the requirements of Rule 19 by requesting only limited relief, which can be performed by existing parties but does not serve the purpose of the statute.

This court has said, with regard to discrimination prohibited by Title VII, "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Company*, 401 U.S. 424, 431 (1971). To remedy discrimination, "The court has not merely the power but the duty to render a decree which will so far as possible eliminate discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). By contrast, the court has no power to modify terms of employment if the change will not have the effect of remedying unlawful discrimination. *Southbridge Plastics Division v. Local 759* (5th Cir. 1978) 565 F.2d 913, 916; *Stevenson v. International Paper Company* (5th Cir. 1975) 516 F.2d 103, 118.

Responding to the purposes of Title VII and Rule 19, the Court of Appeals for the District of Columbia has refused to issue "rather ineffective symptomatic relief, leaving the root (sexually segregated locals) to continue," in a suit charging sex segregation in two local unions,

where the plaintiffs had not joined the parent international union as defendant, and where only the international union could merge, suspend or terminate operation of the two local unions. *Evans v. Sheraton Park Hotel* (D.C.Cir. 1974) 503 F.2d 177. Similarly, the Eighth Circuit, in *Gilmore v. Kansas City Terminal Railway Company* (8th Cir. 1975) 509 F.2d 48, ordered absent unions joined in a Title VII action against an employer because the evidence suggested that they were "at least partially responsible for the absence of minority persons within the requisite training for at least the lower-level supervisory positions." *Id.* at 52-53. See also *Cedillo v. International Association of Bridge and Structural Iron Workers, Local Union No. 1* (7th Cir. 1979) 603 F.2d 7. The ruling of the Ninth Circuit here is inconsistent with each of these decisions.

The Sixth Circuit, in *NLRB v. Doug Neal Management Company* (6th Cir. 1980) 620 F.2d 1133, has expressly followed and quoted from the reasoning of the District Court in this case, while denying reinstatement for employees whose work under a maintenance contract ceased to exist after an absent third party automated its operations. By following the District Court here, the Sixth Circuit has taken a position in direct conflict with the Ninth Circuit and affirmed that Rule 19 is concerned with the practical ability of an absent party to frustrate relief.

The Ninth Circuit here conceded that, "Without the joinder of the employers, any court order that may be entered to enjoin JATC to institute programs cannot go beyond the authority JATC has under the trust fund

agreement." Appendix A, p. 12. The Ninth Circuit did not question the District Court's holding that absent employers were not parties sufficiently identified an interest with the apprenticeship committee to be bound by a decree as non-party participants under Rule 65(d), Federal Rules of Civil Procedure, citing *Regal Knit Wear Company v. National Labor Relations Board* (1945) 324 U.S. 9, 13-14 (1945). It left the District Court without the means to compel an end to the alleged discrimination in apprentice hiring, because a first-come, first-served system of referral and dispatch is no barrier as long as employers have the right under the contract to refuse dispatches.

The Ninth Circuit's decision raises the additional question of whether plaintiffs can state a claim against the apprenticeship committee for which relief can be granted under Title VII, when the apprenticeship committee is the only defendant. The District Court for the Northern District of Illinois has ruled that a law school which makes its placement facilities available to employers is not compelled to investigate their hiring practices or bar those who discriminate from using its placement facilities. *Kaplowitz v. University of Chicago* (N.D.Ill. 1974) 387 F.Supp. 42, 48-49. That decision suggests that the apprenticeship committee has no legal responsibility to police the hiring practices of participating employers. The Northern District of Illinois said that a contrary ruling would substitute whatever investigative and hearing process the school might select for investigation upon a charge filed with the Equal Employment Opportunity Commission under 42 U.S.C. Section 2000(e)-5 and circumvent the jurisdictional requirements under Title VII, imposing an enor-

mous administrative burden upon conventional employment agencies and the like which was not clearly mandated by the statutory language.

The Ninth Circuit's decision also raises a question of fairness and due process by allowing plaintiffs to make the apprenticeship committee a surrogate defendant to answer for the hiring policies of the 4800 employers of construction carpenters in Northern California. If plaintiffs can make out a prima facie case on statistics alone, the JATC may be put to the burden of establishing legitimate reasons why plaintiffs were not employed, based upon facts which are within the exclusive control of plaintiffs and the respective employers. See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). There may be many facts in individual cases which would justify low representation among women in the apprenticeship program in various areas, of which some examples are: The employer had no women applicants under the "hunting license" system; the employer had no work for beginning apprentices; the employer had fewer than five journeymen and was not required to hire apprentices; the employer's business was located in one of several geographical areas where there were no women applicants; because of heavy lifting or height requirements of the job, qualified women were not available; or the employer did hire women apprentices without discrimination as openings and applicants were available. Standards for selection of employees used by 4800 contractors working in various subdivisions in the carpentry trade covered by the apprenticeship program, from two or three carpenter roofing businesses to residential developers hiring hundreds of

framing contractors, would inevitably be so complex and diverse, according to difficulty and nature of work and available labor pools, that we cannot conceive that the JATC would have the resources to assemble the evidence.

The Ninth Circuit's decision also leaves open the possibility that women applicants who are not hired by employers to whom they are referred and dispatched will be required to file separate lawsuits under Title VII, and the courts will be required to retry many of the same issues on an individualized basis, because parties not joined in this proceeding will not be estopped by any judgment rendered here. The expenditure of judicial resources in pursuing this action without joining the employers cannot be justified by the benefits to be obtained under Title VII.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: April 26, 1982.

Respectfully submitted,
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(Appendices follow)